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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 897

OSAGE TRIBE OF INDIANS AND FRED LOOKOUT, Principal Chief and member of the Osage Tribe of Indians, on behalf of said Tribe and the members thereof, *Petitioners*,

v.

HAROLD L. ICKES, Secretary of the Interior of the United States, and TOM H. FRALEY, Treasurer of Osage County, Pawhuska, Oklahoma, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, the appellants below, pray a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on the 11th day of January 1943 (R. 55) affirming the judgment of the District Court of the United States for the District of Columbia in sustaining a motion to dismiss the complaint.

OPINIONS BELOW.

The three judge statutory court rendered an opinion refusing to pass on the motion to dismiss and remitted the case to Mr. Justice Letts sitting as a single judge (R. 27-39), who granted the motion to dismiss (R. 13). The opinion of the United States Court of Appeals for the District of Columbia is found at (R. 54).

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on the 11th day of January 1943 (R. 55) and the jurisdiction is invoked under Section 240a of the District Code as amended February 13, 1935, 28 U. S. C. Section 347.

QUESTION PRESENTED.

The complaint (R. 2) sought an injunction to restrain the defendant Secretary of the Interior from paying and the defendant Treasurer of Osage County, Oklahoma from receiving the sum of $1,535.70, part of the proceeds of royalties from gas and oil leases which had been executed by the tribal council. The royalties thus received were required by the Act of June 28, 1906 (R. 20) to be placed by the Treasurer of the United States to the credit of the members of the tribe for the use and benefit of the individual members thereof. This Act of March 3, 1921 (R. 24) placed an additional burden equal to 1 per cent upon the royalties received by the tribe for the construction and maintenance of roads and bridges in Osage County. The $1,535.70 which the complaint sought to enjoin the Secretary of the Interior from paying, was the undistributed residue of the 1 per cent fund and was in addition to the $1,092,338.17 which the Secretary of the Interior had already paid to Osage County for the construction of roads and bridges, prior to its discontinuance in the Act of April 25, 1940 (R. 25).

The complaint alleged that the provision of Section 5 of the Act of March 3, 1921 authorizing the Secretary of the

Interior to pay this additional sum of 1 per cent of the royalties was arbitrary, capricious, confiscatory, was inconsistent with the obligation due from the United States to its wards and with the express trust declared in the deed of indenture, was an unconstitutional taking of the Indian property or moneys and was repugnant to the Constitution in that it deprived the Indians of their property without compensation or without due process of law.

The three judge statutory court and the Court of Appeals refused to consider the constitutionality of the Act in question on the ground that the United States was an indispensable party to the suit. The three judge statutory court said in its opinion that whether or not the constitutionality of this statute "can even be tried depends upon whether the United States consents to be sued." (R. 33)

REASONS FOR GRANTING THE WRIT.

The United States Court of Appeals held that the decision of the statutory court was in all respects correct, and on its opinion affirmed the order dismissing the suit. (R. 54.) It is admitted by the courts below that Section 5 of the Act of March 3, 1921 placed a burden exceeding $1,000,000 upon the Indians' royalties when no such burden is placed upon other like property in Osage County. The Indians constitute about 1100 inhabitants of Osage County, Oklahoma, out of a total population of about 40,000. Thus it appears that without determining whether this is a constitutional burden upon the Indians' royalties, both courts below hold that even if it is unconstitutional, the Indians are without redress save by an Act of Congress, and the indispensability of the United States as a party precludes the possibility of this question being determined by the courts. We assert that this is a grave injustice to the Indians, a violation of the duties of the United States as trustee in an express trust and in violation of the Constitution of the United States. For these reasons, the writ of certiorari should be granted for the protection of the Indian wards of the Government as a class.

SPECIFICATION OF ERRORS.

1. Both courts below erred in sustaining the motion of the defendants to dismiss the complaint.

2. Both courts below erred in not denying the motion to dismiss the complaint.

3. Both courts below erred in not first determining the constitutionality of Section 5 of the Act of March 3, 1921, before holding and deciding that the United States was an indispensable party to this suit.

ARGUMENT.

The United States is not an indispensable party to this suit to restrain the Secretary of the Interior from exercising an authority to confiscate the property of the Indian tribe and its members.

The three judge court based its conclusion that the United States was an indispensable party on *Morrison* v. *Work*, 266 U. S. 42. We assert that this case comes within the class of cases excepted from the decision in *Morrison* v. *Work* by Mr. Justice Brandeis who wrote the opinion. Speaking for a unanimous court, Justice Brandeis said:

> "The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer of the government, to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, *or that Congress lacked the power to confer the authority exercised.*" (p. 486) (Italics ours)

The instant case, on the other hand, is identical with those cases "in which relief by injunction has been granted against the head of an executive department, or other officer of the government, to enjoin an official act on the ground * * * that Congress lacked the power to confer the authority exercised." This point and this distinction was expressly

recognized and accentuated in *Barr* v. *Rhodes*, 35 Fed. Supp. 223, 224, 225. There the court said:

> "The defendant contends that the action is one in effect against the United States and that the United States cannot be sued except with its consent, which consent has not been given in this matter. It is of course settled as a general proposition that the United States cannot be sued without its consent. But it is also well settled that in many instances officers of the United States can be sued without it being construed as a suit against the Government. It depends upon the facts in each case as to whether or not a suit against an officer of the United States is essentially a suit against the United States. The following cases are examples of where suits against federal officials were dismissed because they were essentially suits against the United States. (Citing cases, one of which is *Morrison* v. *Work*) Examples of where suits against federal officials have been permitted are the cases of (citing cases). The opinion in *Morrison* v. *Work, supra*, recognizes the right to grant relief by injunction against the head of an executive department or other officer of the government when the official act complained of was not within the authority conferred or was an improper exercise of such authority, or when Congress lacked the power to confer the authority exercised. The distinction between the two classes of cases was pointed out by the court in *Philadelphia Co.* v. *Stimson, supra* (223 U. S. 605, 32 S. Ct. 345, 56 L. ed. 570) as follows: 'Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions, to the irreparable loss of the complainant which is the basis of the decree'."

In the case of *Ickes* v. *Fox*, 300 U. S. 82, 96, 81 L. ed. 525, the court said that the suits in that case were—

> "brought to enjoin the Secretary of the Interior from enforcing an order the wrongful effect of which will be to deprive respondents of vested property rights * * *. That such suits may be maintained without

the presence of the United States has been established by many decisions of this court, of which the following are examples: Noble v. Union River Logging R. Co., 147 U. S. 165, 171, 172, 176, 37 L. ed. 123, 125-127, 13 S. Ct. 271; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 56 L. ed. 570, 576, 32 S. Ct. 340; Goltra v. Weeks, 271 U. S. 536, 544, 70 L. ed. 1074, 1078, 46 S. Ct. 613; Work v. Louisiana, 269 U. S. 250, 254, 70 L. ed. 259, 262, 46 S. Ct. 92; Payne v. Central P. R. Co., 255 U. S. 228, 238, 65 L. ed. 598, 603, 41 S. Ct. 314. These decisions cite other cases to the same effect. The recognized rule is made clear by what is said in the Stimson Case."

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. (The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. * * * And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.)

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States." (p. 619-260)

The decision of the court below is in conflict with the quoted language of *Morrison* v. *Work*, *supra;* is in conflict with *Philadelphia Co.* v. *Stimson*, *supra*, and the cases therein cited. It is further in conflict with the opinion of the court in *Barr* v. *Rhodes*, 35 Fed. Supp. 223, where the court construes *Morrison* v. *Work*, *supra*, as recognizing the right to grant injunctive relief against an officer of the Government acting under a statute which Congress had no power to enact. Specifically confirming the petitioners'

position that whether or not a public officer can be sued for his acts done under color of his office depends upon whether or not those acts were lawful, and that the legality of such acts will be first determined, is *Banco de Espana* v. *Federal Reserve Bank,* 114 Fed. (2nd) 438, where Judge Clark writing the opinion of the Circuit Court of Appeals discusses this question with care.

We further insist if *Morrison* v. *Work, supra,* can be given the interpretation placed upon it by the courts below that even though an Act of Congress is unconstitutional the United States is an indispensable party to a suit to restrain a public officer from enforcing such act, the case should be overruled.

If the construction placed upon it by defense counsel is correct, such counsel could stand at the bar of this court and triumphantly admit and insist that Section 5 of the Act of March 3, 1921, is null and void; could insist that the 1 per cent levied on Osage royalties for Osage County, is unwarranted and unconstitutional; could admit that the $1,000,000 heretofore paid under that Act out of Osage funds to Osage County by the Secretary was an act of confiscation and not of guardianship; and could then with an air of triumph challenge this court to know: What do you intend to do about it? The court would have no choice but to wish that the framers of the Constitution had provided effectually that no person, not even an Indian, can be deprived of property without due process of law, without compensation, and without the owner's consent, and that the courts were clothed with power to prevent the spoliation of the Indians.

The action of the public officer in this case was not in the exercise of guardianship but was an act of confiscation in directing the payment to Osage County of money belonging absolutely to the Osage Tribe of Indians or its individual members. *Choteau* v. *Barnett,* 283 U. S. 691, 695. There is no decision which upholds the power of Congress to deal without limitations and restraint even with the "tribal property" of the Indians. The power of Congress to man-

age the property of the Indians is subject to constitutional limitations and does not enable the Government to give the lands of one tribe or clan to another or to deal with them as its own. *Chippewa Indians* v. *U. S.*, 301 U. S. 373, 375. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294. *U. S.* v. *Creek Nation*, 295 U. S. 103, 109. *Shoshone Tribe* v. *United States* 299 U. S. 476. (Holding Spoliation is not Management.)

If Congress could authorize the taking of more than $1,000,000 of the Osage royalties and giving it to Osage County for the construction of roads and bridges, it could equally direct the payment of all of the income of the Osages to Osage County, and it would seem a monstrous doctrine to hold that even though Congress had acted for the destruction of the Indian property, for its confiscation and for their spoliation, the officer could not be restrained who attempted to enforce such a statute without the consent of the Congress that enacted the statute.

We confidently assert, therefore, that the Indian wards of the Government are entitled to the protection of the courts in the determination of the validity of this Act of Congress and that if *Morrison* v. *Work*, *supra*, can be construed to hold the contrary, it should be definitely overruled. Otherwise, judicial life is given to the corpse of a void statute, and the mantle of governmental immunity is extended over the shoulders of a public officer attempting to exercise an authority which Congress had no power to confer.

CONCLUSION.

The petitioners therefore pray that a writ of certiorari may issue and upon a review the judgment of the United States Court of Appeals for the District of Columbia and the judgment of the District Court for the District of Columbia be reversed.

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